(2)

Supreme Court, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1864

IN THE

Supreme Court of the United States

October Term, 1987

CLEVELAND NEWSPAPER GUILD, LOCAL 1,
THE NEWSPAPER GUILD, *et al.*,
Petitioners,

vs.

PLAIN DEALER PUBLISHING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ELLIOT S. AZOFF, *Counsel of Record*
KAREN B. NEWBORN
SUSAN M. GILLES
BAKER & HOSTETLER
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200
Counsel for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

42pp

QUESTION PRESENTED

1. Whether the Court of Appeals correctly ruled that laches may be applied in Title VII cases, that its application involves a fact-dependent inquiry by the District Court, and that the District Court in this case properly exercised its discretion in granting Respondent's Motion For Summary Judgment on the basis of laches where the charging party, a labor union with specialized knowledge and responsibility in equal opportunity matters, delayed filing suit for over ten years despite knowing that there was no active ongoing EEOC investigation and that it had a right to institute a civil proceeding and where Respondent thereby suffered prejudice in the form of lost witnesses, diminished memories, and lost documentary evidence.

II.

LIST OF PARTIES AND RULE 28.1 LIST

The Petitioners are The Cleveland Newspaper Guild, Local 1 of The Newspaper Guild, AFL-CIO, CLC; Cynthia Reece; C. Victoria Fleming; Alma Kaufman; Nancy Barnhouse and Judith K. Sammon. The Respondent is the Plain Dealer Publishing Company. Respondent has no publicly owned affiliates or publicly owned subsidiaries.

TABLE OF CONTENTS

QUESTION PRESENTED I

LIST OF PARTIES AND RULE 28.1 LIST II

TABLE OF AUTHORITIES VI

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

Nature of the Case 2

Statement of Facts 4

I. The Guild's Charge 4

II. The Guild's Disregard Of The Charge 4

III. The Lack Of Notice To The Plain Dealer 5

IV. The EEOC's Inaction And The Guild's Failure To Monitor 5

V. The EEOC's Abandonment Of Its Subpoena 6

VI. The Two-Year Delay After The Issuance Of The EEOC's Finding 8

REASONS WHY THE PETITION SHOULD BE DENIED 9

I. THIS COURT RECENTLY DENIED CERTIORARI IN A CASE PRESENTING VIRTUALLY IDENTICAL ISSUES 9

II. PETITIONERS' REQUEST THAT THIS COURT ESTABLISH A SPECIAL RULE GOVERNING THE APPLICATION OF LACHES IN TITLE VII CASES IS INCOMPATIBLE WITH THE FACT-DEPENDENT NATURE OF LACHES AND INCONSISTENT WITH THIS COURT'S PRIOR RULINGS 10

A. This Court Should Deny Certiorari Since The Petition Is Based On The Erroneous Premise That Title VII Plaintiffs Deserve A Special Exemption From The Doctrine Of Laches..... 11

B. This Court Should Deny Certiorari Because Equity Abhors Mechanical Rules 11

III. A GRANT OF CERTIORARI IS UNNECESSARY BECAUSE THERE IS NO "SPLIT" IN THE CIRCUITS..... 13

IV. A GRANT OF CERTIORARI IS INAPPROPRIATE BECAUSE THIS CASE HAS UNIQUE FACTS..... 17

A. The Charging Party Is A Labor Union Sophisticated In The Area Of Equal Opportunity Law And Fully Aware Of Its Right To Commence A Lawsuit 17

B. The Charging Party Intentionally Delayed As Part Of A Litigation Strategy..... 18

C. The EEOC Process Was Dormant..... 19

D. In 1976 The EEOC Changed Its Notice Procedures So That A Respondent Is Now Notified Of The Identity Of The Charging Party And The Specifics Of The Charge Within Ten Days Of The Charge's Filing.... 21

V. WHETHER LACHES BARS AN ACTION IS A QUESTION PRIMARILY ADDRESSED TO THE TRIAL COURT'S DISCRETION 24

CONCLUSION..... 24

APPENDIX:

Charging Party Follow-Up Notice..... A1

42 U.S.C. §2000e-9 ..... A2

29 U.S.C. §161..... A2

29 C.F.R. §1601.15 (effective 1976)..... A4

29 C.F.R. §1601.13 as implemented by Federal Register, Vol. 41, No. 160..... A6

29 C.F.R. §1601.14 ..... A9

TABLE OF AUTHORITIES

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 10,11,12

Baldwin County Welcome Center v. Brown, 466 U.S. 147, *reh'g denied*, 467 U.S. 1231 (1984) 11

Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), *on reh'g en banc*, 619 F.2d 459 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981) 13,16,22

Bishopp v. District of Columbia, 788 F.2d 781 (D.C. Cir. 1986), *cert. denied*, 451 U.S. 971 (1981) 15

Boone v. Mechanical Specialities, Co., 609 F.2d 956 (9th Cir. 1979) 13,15

Bratton v. Bethlehem Steel Corp., 649 F.2d 658 (9th Cir. 1980) 18

Brown v. Continental Can Co., 765 F.2d 810 (9th Cir. 1985) 16

Burnett v. New York Central Railroad Co., 380 U.S. 424 (1964) 11,24

Cleveland Newspaper Guild v. Plain Dealer Publishing Co., 839 F.2d 1147 (6th Cir. 1988) 13

Costello v. United States, 365 U.S. 265 (1961) 10,11

Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1955) 12

EEOC v. First Alabama Bank of Birmingham, 611 F.2d 132 (5th Cir. 1980) 20,21

EEOC v. First Alabama Bank of Birmingham, 440 F. Supp. 1381 (N.D. Ala. 1977), *aff'd.*, 611 F.2d 132 (5th Cir. 1980). 21

EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69 (3rd Cir.), *cert. dismissed*, 469 U.S. 925 (1984) . 22

EEOC v. Packard Electric Division, General Motors Corp., 569 F.2d 315 (5th Cir. 1978) 20

Fowler v. Blue Bell, 596 F.2d 1276 (5th Cir.), *reh'g denied*, 601 F.2d 1195 (1979) 22

Garrett v. General Motors Corp., 844 F.2d 559 (8th Cir. 1988) 13,15

General Engineering, Inc. v. NLRB, 341 F.2d 367 (9th Cir. 1965). 20

Gifford v. Atchison, Topeka & Santa Fe Railroad, 685 F.2d 1149 (9th Cir. 1982) 13,14,15

Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, *reh'g denied*, 374 U.S. 858 (1963) 12

Holmberg v. Armbrecht, 327 U.S. 392 (1946). 12

Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985). 13,16

Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984). 13,16

Jeffries v. Chicago Transit Authority, 770 F.2d 676 (7th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986) 9,10,13,15

NLRB v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980). 20

North American Rockwell Corp. v. NLRB, 389 F.2d 866 (10th Cir. 1968) 20

Occidental Life Insurance v. EEOC, 432 U.S. 355 (1977). 10,24

Rozen v. District of Columbia, 702 F.2d 1202 (D.C. Cir. 1983) 13,14,22

Sangster v. United Air Lines, 633 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981) 15

Waddell v. Small Tube Products, Inc., 799 F.2d 69 (3rd Cir. 1986) 13,14,16

Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243 (8th Cir. 1987) 13,15

Statutes and Rules

42 U.S.C. §2000e 9

42 U.S.C. §2000e-9 19

29 U.S.C. §161 19,20,21

29 C.F.R. §1601.13 (effective 1976) 23

29 C.F.R. §1601.14 23

29 C.F.R. §1601.15 (effective 1976) 20

Miscellaneous

J. Pomeroy, *II Equity Jurisprudence*, §419c (S. Symons 5th ed. 1941) 12

IN THE

Supreme Court of the United States

October Term, 1987

Case No. 87-1864

CLEVELAND NEWSPAPER GUILD, LOCAL 1,
THE NEWSPAPER GUILD, *et al.*,
Petitioners,

vs.

PLAIN DEALER PUBLISHING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Plain Dealer Publishing Company, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's *en banc* opinion in this case. That opinion is reported at 839 F.2d 1147 (1988).

STATUTES INVOLVED.

In addition to those statutes and regulations set out in Petitioners' Appendix the following provisions are involved and are set out in Respondent's Appendix at the pages indicated:

42 U.S.C. §2000e-9: A2.

29 U.S.C. §161: A2 through A3.

29 C.F.R. §1601.15 (effective 1976): A4 through A5.

29 C.F.R. §1601.13 (effective 1976): A6 through A8.

29 C.F.R. §1601.14: A9.

STATEMENT OF THE CASE

NATURE OF THE CASE

This brief is filed in opposition to a petition for a writ of certiorari from the decision of the Sixth Circuit Court of Appeals, *en banc*, which upheld the grant of summary judgment to Respondent due to Petitioners' inexcusable and prejudicial ten-year delay in filing suit.

Over sixteen years ago, on April 12, 1972 Cleveland Newspaper Guild, Local 1 (the "Guild" or the "charging party") filed a sex discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The Guild was the only charging party. No individuals were parties to the charge. Respondent Plain Dealer Publishing Company (the "Plain Dealer" or "Respondent") was not notified of the identity of the charging party or given any other details about the charge for over four years until May 1976.

Although first informed in 1974 of its right to sue, the Guild did not request a notice of right to sue until May 1982, ten years after filing the charge. On August 18, 1982, eighty-nine days after receiving its notice of right to sue, the Guild commenced this action. The Plain Dealer expeditiously answered the complaint pleading laches as an affirmative defense. After discovery, limited by agreement to the issue of laches (R. 9, Pre-trial Minutes), the Plain Dealer moved for summary judgment arguing that the doctrine of laches barred plaintiffs' claim.

The District Court granted the Plain Dealer's Motion and dismissed the action on January 10, 1986. The District Court found that the more than ten-year delay between the filing of the EEOC charge and the filing of this suit was inexcusable under the circumstances. The District Court noted that the charging party, a labor union with specific knowledge and responsibility in equal

opportunity matters, offered no reasonable account for its inaction during the ten-year pendency of its charge, and knew of its right to obtain a right to sue notice and institute a civil action; that there was no on-going EEOC activity to which the charging party could point as justification for its inaction; that for over four years the Respondent was not provided with the identity of the charging party, nor with a copy of the charge, nor with any details of the charge and that Respondent had suffered prejudice in the form of lost witnesses and documentary evidence.

Plaintiffs appealed to the Sixth Circuit seeking a reversal of the District Court's Order. In an *en banc* decision the Sixth Circuit upheld the District Court, finding that the trial court had correctly exercised its discretion in granting summary judgment on the basis of laches.

Statement of Facts

I. The Guild's Charge.

Over 16 years ago, on April 12, 1972, the Guild filed a charge with the EEOC alleging sex discrimination against female members of the Guild in the terms and conditions of employment at the Plain Dealer. No individuals were parties to this charge; nor were any specific discriminatory actions recited (R. 15, Motion for Summary Judgment, Exh. A, Charge). No specific problems or incidents occurred in 1972 giving rise to the charge. Rather, the charge was the product of then Executive Secretary Jack Weir's and the Guild's intuitive feeling that sex discrimination existed at the Plain Dealer (R. 15, Motion for Summary Judgment, Exhs. B-1 to B-4, Weir Deposition). Despite numerous grievance, negotiation, and other meetings over the years that followed, the Guild never informed the Plain Dealer that it had filed such a charge.

II. The Guild's Disregard Of The Charge.

For the next four years, from 1972 to 1976, the Guild's and the EEOC's sole activity relating to the charge consisted of a single incident. In 1974, the Guild received a notice from the EEOC that its charge was then two years old, that the EEOC had been unable to process the charge and that the agency was unable to predict when it would commence processing the charge. The Guild was asked whether it would like (1) the EEOC to keep the charge open, processing it when the agency was able; (2) to sue privately in federal court; or (3) to close the matter. If the Guild chose to sue in federal court, the EEOC promised to provide assistance (Respondent's Appendix at A-1, Charging Party Follow-up Notice).

Despite being fully apprised of its right to sue, knowing that its charge was lying dormant and that no progress could be expected, on September 4, 1974, the Guild, per Jack Weir, simply requested that the Plain

Dealer charge remain open. The Guild also asked for a copy of the charge since it had lost its copy (R. 15, Motion for Summary Judgment, Exhs. E, Weir Letter and F, Weir Deposition). Thereafter, the charge basically was forgotten again. The next correspondence between the Guild and the EEOC did not occur until five years later in 1979 when J. Stephen Hatch (Weir's successor as Executive Secretary) wrote a one-line letter inquiring as to its status (R. 15, Motion for Summary Judgment, Exh. G, Hatch Letter).

III. The Lack Of Notice To The Plain Dealer.

Sometime in May 1972, the Plain Dealer received an EEOC Form No. 131, notifying it that a charge of sex discrimination had been filed. This notice contained no other information. The person or organization filing the charge was not identified; nor did the notice detail any specific circumstances underlying the alleged discrimination; nor did it identify in which of the Plain Dealer's many departments discrimination was allegedly occurring. Without such information the Plain Dealer could not determine for which of its two thousand employees records should be saved.

The notice instructed the Plain Dealer to hold in abeyance all questions regarding the charge until the EEOC began its investigation (R. 15, Motion for Summary Judgment, Exh. C, Form No. 131 and Fields Aff. pp. 1-2). The Plain Dealer was not contacted again by the EEOC until May 1976 (R. 15, Motion for Summary Judgment, Fields Aff. p. 2).

IV. The EEOC's Inaction And The Guild's Failure To Monitor.

Not until the spring of 1976, four years after the charge had been filed, did the EEOC belatedly commence its "investigation." At that time, the Plain Dealer was for the first time informed that the 1972 charge had been

filed by the Guild and that the dispute centered in its Editorial Department (R. 15, Motion for Summary Judgment, Wilharm Aff. pp. 1-2, Fields Aff. p. 2).

After learning the locus of the EEOC charge, the Plain Dealer's Personnel Director, Herman Fields, sought information from the Executive Editor, Tom Guthrie. Guthrie, the chief decision maker in the Editorial Department as to hiring, promotion and merit increases, informed Fields that having been involved in innumerable decisions involving promotions, raises, etc., he had no recollection of the myriad of decisions made in 1972, let alone the reasons for them. He stated that internal memos and personal notes which might have assisted him in reconstructing these decisions had been destroyed in the ordinary course of business (R. 15, Motion for Summary Judgment, Fields Aff. pp. 4-5). The Plain Dealer, therefore, notified the agency that the EEOC should dismiss the charge and cease investigating because the four-year delay had substantially impaired the Plain Dealer's ability to respond.

On June 24, 1976, the EEOC stated that it would not dismiss the charge and requested a lengthy list of documents and information about Guild employees for the previous six years (1970-1976) (R. 15, Motion for Summary Judgment, Wilharm Aff. p. 2). On July 8, 1976, the Plain Dealer notified the EEOC that it would not voluntarily submit the information requested citing the prejudice that the Plain Dealer had suffered as a result of the already over four-year delay (R. 21, Brief in Opposition, Exh. 1, Wilharm July Letter; R. 25, Reply Brief on Summary Judgment, Exh. LL, Wilharm June Letter).

V. The EEOC's Abandonment Of Its Subpoena.

On August 25, 1976, the EEOC issued a subpoena demanding production of documents covering 1970 to 1976. The Plain Dealer immediately responded to the subpoena on September 1, 1976, by filing a Petition To Revoke And/Or Modify Subpoena Ad

Testificandum/Duces Tecum on grounds of, *inter alia*, the prejudice to the Plain Dealer and the EEOC's failure to sufficiently identify the material sought (R. 15, Motion for Summary Judgment, Wilharm Aff. p. 3).

No ruling on the Plain Dealer's petition to revoke the subpoena was received from the EEOC *for over one year*, in violation of the EEOC's own regulations. On October 6, 1977, Plain Dealer counsel finally received a copy of a September 28, 1977 decision denying revocation of the subpoena (R. 15, Motion for Summary Judgment, Wilharm Aff. p. 3). Promptly, on October 17, 1977, counsel for the Plain Dealer informed the EEOC by letter that since the decision contained inaccurate facts, and misleading statements, and was not supported by the current law, the Plain Dealer would not appear as directed (*Id.* at p. 3).

The Plain Dealer was not contacted again in regard to the Guild's charge for more than *two and one half years*. On June 17, 1980, counsel for the Plain Dealer received a letter finally notifying it that the EEOC had chosen not to seek to enforce its subpoena (*Id.* at p. 3).

The Guild characterizes the four-year period from 1976 to 1980 as a four-year investigation by the EEOC. The above facts belie this contention. Nearly all of this time period was accounted for by the total inaction of the EEOC. Moreover, during this period the Guild corresponded only *once* with the agency with regard to the status of the charge. On July 30, 1979, J. Stephen Hatch wrote a brief fifteen-word message:

> Dear Mr. Gray:
>
> Please advise as to to [sic] status of Case File No. TCL2 1613, filed April 12, 1972.
>
> Sincerely,
>
> J. Stephen Hatch
> Executive Secretary
> (R. 15, Motion for Summary Judgment, Exh. G, Hatch Letter).

VI. The Two-Year Delay After The Issuance Of The EEOC's Finding.

On October 10, 1980, the EEOC issued a finding of reasonable cause, based on a scant, general statistical analysis, and on the Plain Dealer's failure to supply information (R. 15, Motion for Summary Judgment, Wilharm Aff. p. 4; R. 1, Complaint, Exhs. B1-B2, EEOC Finding). Subsequently, on May 21, 1982, the EEOC finally issued a notice of right to sue to the Guild. On August 18, 1982, more than ten years (124 months) after filing its charge of discrimination, the Guild finally filed suit.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT RECENTLY DENIED CERTIORARI IN A CASE PRESENTING VIRTUALLY IDENTICAL ISSUES.

On March 3, 1986, this Court denied a petition for writ of certiorari in the case of *Jeffries v. Chicago Transit Authority,* Supreme Court Case No. 85-6096, denial of certiorari reported at 475 U.S. 1050 (1986). The Questions Presented in that case were virtually identical to those raised by the instant Petitioners. They stated, in part:

> 1. Whether, in an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, the "inexcusable delay" necessary to establish a laches defense may be premised entirely upon the length of time that the EEOC has taken to process a charge of discrimination, when the charging party has himself complied with all statutory time filing requirements.
>
> 2. Whether, in an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, the "material prejudice" necessary to establish a laches defense may be premised solely upon (a) the employer's unilateral destruction of documentary evidence in violation of relevant EEOC regulations. . . . [Petition For A Writ Of Certiorari, Case No. 85-6096, at i.]

Respondent respectfully urges this Court to likewise deny Petitioners' request for writ of certiorari which simply repeats issues that this Court has already determined unworthy of review.

Moreover, as set out below, the law is even more settled now than when *Jeffries* was appealed since all nine circuits addressing the issue have found that laches will apply to bar Title VII claimants who, like Petitioners, sleep on their rights to the prejudice of the defendant. Denial of certiorari is appropriate in this case.

II. PETITIONERS' REQUEST THAT THIS COURT ESTABLISH A SPECIAL RULE GOVERNING THE APPLICATION OF LACHES IN TITLE VII CASES IS INCOMPATIBLE WITH THE FACT-DEPENDENT NATURE OF LACHES AND INCONSISTENT WITH THIS COURT'S PRIOR RULINGS.

In *Costello v. United States,* 365 U.S. 265, 282 (1961), this Court defined laches as (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. The doctrine of laches applies to Title VII suits. *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 373 (1977); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 424 (1975) ("[A] party may not be 'entitled' to relief if its conduct . . . has improperly and substantially prejudiced the other party.")[1]

Petitioners urge this Court to go further and construct a special rule that laches will never apply in a Title VII case unless a plaintiff is proved to have intentionally caused a delay of the EEOC proceedings (Petition, pp. i, 19). However, this Court has expressly refused to fashion special rules for Title VII cases. And,

[1] In *Occidental* this Court held that neither Title VII nor relevant state statutes set any time limit on the EEOC's investigation of a Title VII charge. Recognizing that in the absence of any time limit the EEOC could delay forever, to the prejudice of Title VII defendants, this Court instructed the trial courts to use their equitable powers to prevent such unfairness.

the special rule proposed by Petitioners is inconsistent with the equitable nature of laches and has not been adopted by any Circuit.

The Circuit courts, following this Court's definition of laches in *Costello* and *Albemarle*, have uniformly held that *no* special rule governing laches applies in Title VII cases. Rather in each case the district court must perform a factual inquiry into the reasonableness of the plaintiffs' failure to file suit in a timely fashion and the prejudice thereby caused to defendants.

A. This Court Should Deny Certiorari Since The Petition Is Based On The Erroneous Premise That Title VII Plaintiffs Deserve A Special Exemption From The Doctrine Of Laches.

Petitioners argue that this Court should overturn the Sixth Circuit *en banc* because it refused to promulgate a rule granting Petitioners a special exemption from the doctrine of laches. But, the contention that Title VII plaintiffs are entitled to a "special status" when they fail to file suit in a timely manner has been rejected by this Court. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, *reh'g denied*, 467 U.S. 1231 (1984) (Title VII plaintiffs who fail to file in a timely fashion are not entitled to a special exemption from the law). Accordingly, certiorari should be denied since Petitioners' argument that there should be special exceptions for Title VII plaintiffs who sleep on their rights has already been rejected.

B. This Court Should Deny Certiorari Because Equity Abhors Mechanical Rules.

This Court has also recognized that laches, as an equitable doctrine, is inherently factual in nature. Its application in any given case depends on the specific circumstances of the case. *See, e.g., Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 435 (1964) ("[w]hether laches bars an action in a given case depends upon the

circumstances of that case"); *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 533 (1955) ("the delay which will defeat . . . a suit must in every case depend on the peculiar equitable circumstances of that case.").

Recognizing that laches requires an *ad hoc* weighing of the facts, this Court has rejected the idea of establishing mechanical rules to govern when laches applies. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). This Court explained:

> Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Id.* at 396 (citations omitted).

See also J. Pomeroy, *II Equity Jurisprudence*, §419c at 175 (S. Symons 5th ed. 1941) ("What constitutes reasonable diligence can be determined by no established rule, for the question must be determined upon the circumstances of each case.")

This Court has also held that given the factual nature of laches—and the need for a case by case examination of the circumstances—laches is primarily a question left to the discretion of the district court whose findings should be reversed only on a showing of clear error. *Albemarle*, 422 U.S. at 424; *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 215, *reh'g denied*, 374 U.S. 858 (1963) (district court's ruling reversible only if clearly erroneous.)

In its *en banc* decision, the Sixth Circuit recognized the "fact-dependent nature of the inquiry" and, after careful review, found that the District Court did not err in its exercise of discretion (Petitioners' Appendix at A-11, A-13). This Court should not grant certiorari in order to establish a mechanical rule, since such a rule would be incompatible with the essential nature of laches.

III. A GRANT OF CERTIORARI IS UNNECESSARY BECAUSE THERE IS NO "SPLIT" IN THE CIRCUITS.

Petitioners argue that this Court should adopt the "intentional delay" rule in order to cure a split in the Circuits. No such "split" exists. All Courts of Appeal which have addressed the issue have held that laches is applicable to bar Title VII suits. *See Waddell v. Small Tube Products, Inc.*, 799 F.2d 69 (3rd Cir. 1986); *Holsey v. Armour & Co.*, 743 F.2d 199 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); *Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979), *on reh'g en banc*, 619 F.2d 459 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981); *Cleveland Newspaper Guild v. Plain Dealer Publishing Co.*, 839 F.2d 1147 (6th Cir. 1988) (this case); *Jeffries v. Chicago Transit Authority*, 770 F.2d 676 (7th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986); *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243 (8th Cir. 1987); *Boone v. Mechanical Specialties, Co.*, 609 F.2d 956 (9th Cir. 1979); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529 (11th Cir. 1984); *Rozen v. District of Columbia*, 702 F.2d 1202 (D.C. Cir. 1983).

None of the Circuits have adopted the inflexible "intentional delay" test which Petitioners urge this Court to establish.[2] The Courts, relying on *Costello*, have held that laches involves a peculiarly factual inquiry in which the district court weighs the particular facts of each case to determine whether the plaintiff lacked diligence in filing suit causing prejudice to the defendant. *See, e.g., Cleveland Newspaper Guild*, (Petitioners' Appendix at A-11) (laches is a "fact-dependent inquiry"); *Whitfield*, 820 F.2d at 245 ("[e]ach case must be considered on its own facts" as "laches is an equitable, hence flexible, doctrine"); *Gifford v. Atchison, Topeka &*

[2] Petitioners do not, nor can they, cite any Circuit case where the Court has adopted the test that a plaintiff's deliberate delay of EEOC proceedings is the only basis for applying laches in a Title VII action. In fact, the only Circuits to address the issue have rejected it. *Waddell*, 799 F.2d 69; *Garrett v. General Motors Corp.*, 844 F.2d 559 (8th Cir. 1988).

Santa Fe Railroad, 685 F.2d 1149, 1152 (9th Cir. 1982) ("[L]aches is an equitable doctrine, its application depending on the facts of the particular case"); *Waddell*, 799 F.2d at 77 (laches "comprehends both the application of a legal standard and an exercise of the trial court's sound discretion in assessing the equitable circumstances of a particular case.")

Petitioners incorrectly claim that the Fourth, Fifth, Ninth, Eleventh and D.C. Circuits have held that a plaintiff has an absolute right to await the completion of the EEOC process (Petition, p. 31 *et seq.*). While these Circuits recognize that it usually is reasonable for a plaintiff to await the termination of EEOC proceedings, the courts have not adopted an absolute rule. In each case the court performed an *ad hoc* inquiry. Where lengthy delays are involved, these Circuits have focused on three factors in asessing whether the plaintiff was diligent:

1. Whether the plaintiff was awaiting the outcome of an *active administrative process*;

2. Whether the plaintiff was diligent in monitoring the EEOC process;

3. Whether the plaintiff was aware of the right to file suit, and yet chose to delay.

Thus, the D.C. Circuit has looked to the plaintiff's knowledge of his/her right to file suit to determine the reasonableness of a plaintiff's decision to delay filing suit until after completion of the EEOC process. *Rozen*, 702 F.2d at 1204 (D.C. Cir. 1983). The court held:

> we cannot impute to Rozen, proceeding *pro se*, knowledge of the statutory scheme that would have authorized him to file suit absent the notice. This is not a case where a plaintiff fails to file suit when that option is known and within the plaintiff's power . . . or where a private plaintiff is offered a right to sue letter yet repeatedly refuses to take action.

See also, Bishopp v. District of Columbia, 788 F.2d 781, 783 n.l. (D.C. Cir. 1986), *cert. denied*, 451 U.S. 971 (1981) (delay not unreasonable as *pro se* plaintiffs testified they did not know that they could file suit before the EEOC issued the right to sue notice).[3]

The Ninth Circuit also has held a plaintiff's delay to be unreasonable where a plaintiff knew the EEOC process "was dormant," was "aware that he could receive a right-to-sue letter and bring a civil action at an earlier time" and yet chose to delay. *See Boone*, 609 F.2d at 960 (9th Cir. 1979). Where there has been a showing either that the plaintiff was unaware of his right to sue, or that the plaintiff was diligent in monitoring the EEOC proceeding, the Ninth Circuit has held the plaintiff's delay "reasonable." *See, e.g., Sangster v. United Air Lines*, 633 F.2d 864, 867 n.3 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981) (plaintiff's delay "not an inexcusable lack of diligence in light of the fact that the EEOC did not inform Sangster of her right to sue and that she did not learn until [after several years] that she could sue without awaiting a final resolution by the EEOC."); *Gifford*, 685 F.2d at 1152 (9th Cir. 1982) (summary judgment denied as dispute of facts where plaintiff's attorney filed an extensive affidavit detailing

[3] Petitioners contrast the D.C. Circuit to the Seventh Circuit. Yet in *Jeffries* the Seventh Circuit relied on similar factors in upholding a grant of summary judgment. *Jeffries*, 770 F.2d 676 (7th Cir. 1985). The Court found Jeffries had counsel (and could not rule out that counsel had helped him with his EEOC claim), should have realized that no administrative resolution was imminent, and "yet he did nothing in the ten years between filing the charge and this suit." The Court, emphasizing the requirement that a plaintiff be diligent, concluded "we do require [plaintiffs in Jeffries' position] to show some interest in prosecuting their claims." *Id.* at 680-681.

Similarly the Eighth Circuit in *Whitfield*, 820 F.2d 243 (8th Cir. 1987), upheld a grant of summary judgment where the Title VII plaintiff inexplicably delayed for ten years during which time he made no effort to check the status of his charge, and throughout which time he knew he could request a notice and file suit. *Id.* at 245. *See also Garrett*, 844 F.2d 559 (8th Cir. 1988) (laches barred action where plaintiff made no effort to actively monitor his claim).

"repeated and continuous efforts of plaintiff and her attorneys to monitor the progress of the charge through the EEOC."); *Brown v. Continental Can Co.*, 765 F.2d 810, 815 (9th Cir. 1985) (summary judgment denied as dispute of fact, court noted there was no evidence that a *pro se* plaintiff deliberately delayed for five years).[4]

Both the Fifth Circuit and the Eleventh Circuit (when it was spun off from the Fifth Circuit in 1981) agree that laches is available, and have gauged the reasonableness of a plaintiff's decision to delay, on the nature of the EEOC's process. Both have held that a plaintiff can normally await the outcome of an "active continuing administrative process," *see Bernard*, 596 F.2d at 1256 (5th Cir. 1979) and *Howard*, 726 F.2d at 1532 (11th Cir. 1984), but neither has addressed a case where a plaintiff was both aware that the EEOC process was dormant and of the right to bring suit and yet elected to delay filing suit.

A similar approach was taken by the Third Circuit in *Waddell*. The Court explained: "plaintiffs have some obligation to monitor the progress of their charge and do not have the absolute right to await termination of EEOC proceedings where it would appear to a reasonable person that no administrative resolution will be forthcoming." *Waddell*, 799 F.2d at 77.

In short, the Courts are uniform in holding that laches may bar a Title VII action. None have adopted the rule Petitioners seek. Rather the Courts have developed case law requiring an *ad hoc* inquiry into the reasonableness of each plaintiff's delay.

---

[4] The Fourth Circuit has never considered a case, like the instant litigation, involving a lengthy delay and severe prejudice. In its sole decision, *Hosley*, 743 F.2d 199, the Fourth Circuit upheld a finding of race discrimination. In passing, it also affirmed the district court's rejection of laches where the plaintiff delayed four and one half years while the EEOC investigated and attempted conciliation, and where the only prejudice alleged was the death of one witness.

IV. A GRANT OF CERTIORARI IS INAPPROPRIATE BECAUSE THIS CASE HAS UNIQUE FACTS.

Even if, *arguendo,* this Court accepts that there is a split in the Circuits, this case is not an appropriate vehicle for its resolution. This case is factually unique because (A) the charging party is a labor union, sophisticated in the area of equal opportunity law and fully aware of its right to commence suit; (B) the charging party, unlike other plaintiffs, admits that it intentionally delayed filing suit as part of a litigation strategy; (C) the charging party knew that the EEOC process was dormant; and (D) the extreme prejudice to the Plain Dealer arose from inappropriate EEOC procedures which have now been changed. Under any analysis this is the exceptional case where laches applies.

A. The Charging Party Is A Labor Union Sophisticated In The Area Of Equal Opportunity Law And Fully Aware Of Its Right To Commence A Lawsuit.

All of the cases discussed by Petitioners concern suits by individuals, often unrepresented, unsophisticated, and unaware or unable to file suit. Any alleged split in the Circuits over how to treat such plaintiffs cannot be resolved in this case where plaintiff is a labor union with both the know-how and capability to file suit.

The Guild, as Judge Lambros noted (Petitioners' Appendix at A-50), possesses special expertise in the area of equal employment law. It was represented by counsel throughout the period and continually had a women's or human rights committee since 1970 (Petitioners' Appendix at A-50). The Guild was also fully aware of the potential for triggering EEOC action as evidenced in 1973 when the Guild asked a representative

of its International Staff "to pressure EEOC in Cleveland to get Press complaints off dead center" (R. 15, Motion for Summary Judgment, Exh. KK, Minutes of Guild Meetings). The Guild did not similarly prod the EEOC with regard to its Plain Dealer charge. In addition, in 1974 when the EEOC wrote to the Guild reminding the Guild of its right to sue and offering help in litigation, the Guild still chose to delay, doing nothing for a further eight years.

B. The Charging Party Intentionally Delayed As Part Of A Litigation Strategy.

In its supplemental brief to the Sixth Circuit *en banc*, the Guild admitted for the first time in Court pleadings that it viewed delay as an ally—as part of a litigation strategy. The Guild concedes that it was monitoring a simultaneous charge against the Cleveland Press "which case the Guild believed would, when concluded, establish a precedent for resolution of the trailing charge which the Guild had filed against the Plain Dealer." (Appellants' Supplemental Brief to Sixth Circuit *En Banc*, pp. 2-3.)

At best, this strategy reflects an intentional attempt by the Guild to benefit from agency delay without concern to attendant prejudice to the Plain Dealer. At worst, given that in negotiation and grievance channels the Guild never even informed the Plain Dealer it had filed this charge, such prejudice may have been an intended result of the strategy.

Under either alternative, the Guild now admits that it took deliberate advantage of EEOC delays. Such a concession makes imposition of laches even more appropriate. *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 667 n.8 (9th Cir. 1980) (laches should be applied to prevent a plaintiff from "taking deliberate advantage of EEOC delays").

C. The EEOC Process Was Dormant.

There was no active administrative process during the delays in this case. For four years nothing happened. Once the "investigation" finally began in 1976, there were short spurts of sporadic activity followed by years of delay. The District Court noted, "[t]he October 10, 1980 reasonable cause determination . . . appears to have been relatively non-detailed and certainly was not a product of eight years of EEOC effort in the matter" (Appendix at A-52). Moreover, from 1974 on, the Guild was fully aware that the EEOC process was stalled and yet it made no effort to monitor or expedite the process.

In an effort to exculpate its own delays, the Guild asserts that the delay in bringing this action was caused by Respondent's refusal to comply with the EEOC's subpoena. Petitioners argue that this refusal was legally baseless, and laches, therefore, cannot apply.[5] In fact, it was the Guild that unduly delayed and the EEOC, not Respondent, who failed to comply with the law.

The procedures surrounding the issuance of subpoena by the EEOC are governed by 29 U.S.C. §161.[6] That section provides that within five days after the service of a subpoena, the recipient may petition the EEOC to revoke the subpoena. 29 U.S.C. §161(1). The statute requires the EEOC to revoke the subpoena if the evidence sought is not relevant to the matter being investigated, or if the subpoena "does not describe with sufficient particularity" the evidence sought. *Id.*

Although 29 U.S.C. §161(1) specifies two grounds for revocation of an EEOC subpoena, the assertion of other grounds for revocation is not precluded. In construing the statute in the context of the National Labor Relations Act, courts have held that a subpoena may be revoked on any ground which is consistent with the

[5] Petitioners cite the dissent of Judge Milburn (Petitioners' Appendix at A-30).

[6] Section 710 of Title VII, 42 U.S.C. §2000e-9.

purposes of the underlying Act. *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 372-373 (9th Cir. 1965); *North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 873 (10th Cir. 1968); *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 53-54 (9th Cir. 1980). In ruling on applications by the EEOC to enforce subpoenas issued under Title VII, courts have entertained a variety of grounds for opposing such subpoenas, including unreasonable delay in issuing the subpoena, *EEOC v. First Alabama Bank of Birmingham*, 611 F.2d 132 (5th Cir. 1980), and unreasonable or undue burden in complying with the subpoena. *EEOC v. Packard Electric Division, General Motors Corp.*, 569 F.2d 315 (5th Cir. 1978).

In the present action, the EEOC issued its subpoena to Respondent. Respondent filed with the EEOC a timely petition for revocation of the subpoena. As one of the grounds for revocation, Respondent stated that the subpoena failed "to sufficiently identify the material sought." This is a ground specifically listed in 29 U.S.C. §161. Respondent also asserted as grounds for revocation the unreasonable delay by the EEOC in conducting its investigation, and the unduly burdensome nature of the EEOC's subpoena. All of the foregoing are grounds for revocation recognized by the courts. Hence, Petitioners' assertion that Respondent delayed the EEOC's investigation by asserting invalid grounds for revocation of the subpoena is based on an incorrect statement of the law.

In truth, delays related to the subpoena are attributable to the inaction of the EEOC and the charging party's failure to monitor and prod the agency. EEOC regulations in effect in 1976 required the EEOC to make a determination upon Respondent's petition for revocation within five days after receipt of the petition, as far as is practicable. 29 C.F.R. §1601.15(b) (effective

1976). However, the EEOC did not deny the petition for revocation until over one year later, in September 1977. Furthermore, 29 U.S.C. §161(1) authorizes the EEOC to petition any district court of the United States for enforcement of a subpoena issued by it. The recipient of a subpoena is not even legally required to respond to the subpoena until compliance is ordered as a result of district court enforcement proceedings. *EEOC v. First Alabama Bank of Birmingham,* 440 F. Supp. 1381, 1384 (N.D. Ala. 1977), *aff'd,* 611 F.2d 132 (5th Cir. 1980). Here, the EEOC never even attempted to seek judicial enforcement of the subpoena but, instead, after a two and one half year delay, notified Respondent in June 1980 that it would not seek to enforce the subpoena. The delays in the EEOC investigation cannot be laid at the feet of the Respondent.

D. In 1976 The EEOC Changed Its Notice Procedures So That A Respondent Is Now Notified Of The Identity Of The Charging Party And The Specifics Of The Charge Within Ten Days Of The Charge's Filing.

Respondent has suffered extreme prejudice from the loss of key witnesses who made the actual employment decisions and of the records documenting those decisions. For instance, Tom Guthrie, Executive Editor of the Plain Dealer from 1972 until 1977, is now dead, as are six of his Managing Editors and department heads (R. 15, Motion for Summary Judgment, Fields Aff. pp. 5-8). Even if the few remaining witnesses could be located, their memories will have faded in the now 16 years since the events occurred.

The Plain Dealer has also lost documents because it did not receive a copy of the charge until 1976. By that time documents which might have permitted a reconstruction of events had been lost or destroyed in the ordinary course of business.

In addition, Guild officials now have no specific recollection of any facts surrounding the charge and the Guild has destroyed relevant documents in its possession

(R. 15, Motion for Summary Judgment, Weir and Hatch Depositions).

In an effort to escape the application of laches, the Guild argues that this extreme prejudice to the Plain Dealer should be ignored. Petitioners suggest that because an EEOC Form 131 was sent to the Plain Dealer within 26 days after the charge had been filed, the Plain Dealer is to blame for the prejudice caused by the loss of relevant records.[7] Petitioners urge this Court to decide

---

[7] Petitioners cite to *Fowler v. Blue Bell, Inc.*, 596 F.2d 1276 (5th Cir.), *reh'g denied*, 467 U.S. 1231 (1979) and *Bernard*, 596 F.2d at 1249, as support for this proposition and claim that they evidence a split in the Circuits on this issue. Once again, Petitioners' failure to consider all of the operative facts has made their analysis and conclusion untenable. The Guild steadfastly ignores the fact that the Plain Dealer had no idea who had filed this charge or its substance, and consequently no idea what records should be retained. This was not the case in *Fowler* and *Bernard* where the respondents had details of where, when and against whom they allegedly had discriminated. *Bernard*, 596 F.2d at 1253, 1257 (employer destroyed records after being served with a *copy of charge*); *Fowler*, 596 F.2d at 1280 (employer cooperated in investigations and then destroyed documents). Petitioners also rely on *Rozen*. *Rozen* is inapposite as there was no evidence that any records had been destroyed. Moreover, while there is no record evidence that Respondent ever destroyed relevant records after finally receiving notice of the identity of the charging party, the record reflects that it was the Guild who destroyed pertinent records in its possesion after that time.

In *EEOC v. Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 73 n.4 (3rd Cir.), *cert. dismissed*, 469 U.S. 925 (1984), also relied on by Petitioners, defendants were held responsible for the destruction of records, but there the charge "identified thirteen occupational categories" in which discrimination was alleged. If the 1972 notice to the Plain Dealer had stated the "occupational category" (i.e., editorial employees) or named the Guild as complainant (letting the Plain Dealer know that editorial employees were involved) the Plain Dealer would have known that the Editorial Department was the object of the charge and would have been able to preserve records, memos, notes, and applications which evidence how and why employment decisions are made. But Form 131 provided no such information. The Plain Dealer only knew that someone in its employ was alleging sex discrimination in hiring, wages, and terms and conditions. Not even a date of violation was given.

the extent that a Form 131 from the EEOC creates an obligation on the employer to preserve records and potential testimony. However, any ruling by this Court on this issue would *only be* relevant to cases where the claim was filed prior to 1976, since after 1976 the EEOC regulations provide for a copy of the charge to be served. 29 C.F.R. §1601.13 (effective 1976).[8]

The charge usually details the circumstances and place of the alleged unlawful practice *and* provides the "identity of the person filing the charge or, in the case of a charge filed on behalf of any ... individuals, the identity of the person or organization so filing." The charge affords details to the respondent which in many cases will minimize any prejudice caused by delay. This opportunity to minimize prejudice was never given to the Plain Dealer until 1976 when it finally received a copy of the charge. By then, material evidence had already been lost.

In sum, any decision by this Court on the Plain Dealer's obligations to preserve records after receipt of Form 131 would be inapplicable to any case post 1976 where the charge itself was served. This Court should, therefore, decline to grant certiorari.

---

[8] The EEOC may now only serve a form notice in the exceptional case where service of the charge would seriously impede the "law enforcement functions of the EEOC." 29 C.F.R. §1601.13 (effective 1976). *Accord;* 29 C.F.R. §1601.14 (1987).

V. WHETHER LACHES BARS AN ACTION IS A QUESTION PRIMARILY ADDRESSED TO THE TRIAL COURT'S DISCRETION.

Petitioners also argue that a "bar" of this action was inappropriate. Yet this Court has repeatedly held that laches can serve as a complete bar to an action, that determination being one for the district court. *See, e.g., Burnett*, 380 U.S. at 435 ("[w]hether laches bars an action in a given case depends upon the circumstances of that case and is a question primarily addressed to the discretion of the trial court.") Thus this Court in *Occidental*, 432 U.S. at 373, emphasized that it is for the district court to "locate a just result" in light of the circumstances peculiar to the case. The Sixth Circuit expressly adopted this test when it reviewed the District Court's decision and concluded that "prejudice to defendant [could] be avoided in no other way." (A-14). This Court should therefore deny certiorari.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ELLIOT S. AZOFF, *Counsel of Record*
KAREN B. NEWBORN
SUSAN M. GILLES
BAKER & HOSTETLER
3200 National City Center
Cleveland, Ohio 44114
(216) 861-0200
Counsel for Respondent

APPENDIX

CHARGING PARTY FOLLOW-UP

Case #TCL2-16-13 Date Filed 4/12/72

Respondent The Cleveland Plain Dealer

Because of the large number of complaints filed with us, we have not been able to process your charge nor can we predict at this time when we will begin. It is our policy to contact each person whose charge is at least two years old to verify the present address and to determine if the person is still interested in having us take action on the charge. We would like to know your wishes concerning your charge.

You may:

(1) Ask us to keep your charge open and process it when we can; or

(2) Sue the respondent yourself in Federal Court. If you wish, this office will assist in obtaining an attorney to represent you; or

(3) Authorize us to close your charge without further action;

Please complete the postcard below and return it within fifteen (15) days.

/s/ ANNA FRANTZ
Equal Opportunity Specialist

EEOC Form 196
MAR 74

UNITED STATES CODE

42 U.S.C. §2000e-9

§2000e-9. Conduct of hearings and investigations pursuant to section 161 of Title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

29 U.S.C. §161

§161. Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

Documentary evidence; summoning witnesses and taking testimony

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any

matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

Court aid in compelling production of evidence and attendance of witnesses

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

CODE OF FEDERAL REGULATIONS

29 C.F.R. §1601.15 (effective 1976)

§1601.15 Documentary evidence; summoning witnesses and taking testimony.

(a) To effectuate the purposes of title VII, as amended, any member of the Commission shall have the authority to issue subpenas requiring the attendance and testimony of witnesses and the production of evidence, including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpenaed. Any District Director or Deputy District Director of the Commission may issue and sign a subpena on behalf of the Commission. The subpena shall state the name and address of its issuer, identify the person subpenaed, the person to whom and the place, date, and time at which it is returnable. A subpena may be returnable to a duly authorized investigator or other representative of the Commission. No member of the Commission or any District Director or his deputy will issue a subpena upon request of a person filing a charge, a person on whose behalf a charge was filed, or a respondent.

(b) Any person served with a subpena whether ad testificandum or duces tecum who intends not to comply therewith, shall, within 5 days after the date of service of the subpena upon him, petition the Director of Compliance by mail at 1800 G Street NW., Washington, DC 20506 (serving a copy upon the District Director who issued the subpena) to revoke or modify the subpena. The petition shall state each ground upon which the petitioner relies. Within 5 days after receipt thereof, so far as practicable, the Director of Compliance shall make a determination upon the petition, stating reasons, which shall be reviewed by the Commission and unless the Commission decides otherwise shall become final 3 days

thereafter. The Commission shall serve a copy of the final determination of the petition upon the petitioner. For purposes of this section, service shall be made and proof thereof established pursuant to section 11(4) of the National Labor Relation Act, as amended, 29 U.S.C. 161(4), as made applicable to proceedings hereunder by section 710 of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-9.

(c) Upon the failure of any person to comply with a subpena issued under this section, the Commission may utilize the procedures of section 11(2) of the National Labor Relation Act as amended, 29 U.S.C. 161(2), to compel enforcement of the subpena.

[37 FR 9213, May 6, 1972]

29 C.F.R. §1601.13 (As Implemented By Federal Register, Vol. 41, No. 160, August 17, 1976: Rules and Regulations at 34745)

PART 1601—PROCEDURAL REGULATIONS

Procedure for the Prevention of Unlawful Employment Practices

The amendment to §1601.13 sets forth changes necessary to implement Secton 705 of Title VII of the Civil Rights Act of 1964, as amended, which requires that a respondent be served with notice of a charge of discrimination within ten days after the filing of such charge. Prior to this revision, §1601.13 provided that the Commission furnish a respondent charged with an unlawful employment practice with notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) within 10 days after the filing thereof. This revision provides for service of a copy of the charge itself (including the identity of the person filing the charge or, in the case of a charge filed on behalf of any individual or individuals, the identity of the person or organization so filing) by mail or in person within 10 days after filing of the charge where such service would not impede the law enforcement functions of the Commission. Where the Commission determines that service of the charge itself within the 10 day notice period provided in 706(b) of Title VII would impede its law enforcement function, it will serve the notice of the charge, as is its current practice, rather than a copy of the charge.

This amendment is procedural in nature, and the public rulemaking process is not required. This amendment is effective immediately.

By virtue of the authority vested in it by Section 713(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(a), 78 Stat. 265, the Equal Employment Opportunity Commission (hereinafter referred to as the Commission) hereby amends Title 29, Chapter XIV, §1601.13 as follows:

Section 1601.13 is revised to read as follows:

§1601.13 Service of Notice of Charge.

(a) Within ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with the notice of the charge within ten days after the filing of the charge (including the date, place, circumstances and identity of the person filing the charge or, in the case of a charge filed on behalf of any individual or individuals, the identity of the person or organization so filing).

(b) The District Directors, the Commission's Director of the Office of Compliance Programs, and the designated representative of each are hereby delegated the authority to issue the notice described in paragraph (a) of this section.

It is hereby certified that the revised regulation has been assessed for the need of an Inflationary Impact Statement. Because of the nature of the changes this revision does not require an Inflationary Impact Statement.

Signed at Washington, D.C. on this 11th day of August, 1976.

ETHEL BENT WALSH
Vice Chairman, Equal Employment Opportunity Commission

[FR Doc. 76-28827 Filed 3-16-76; 3:45 am]

29 C.F.R. §1601.14

1601.14 Service of charge or notice of charge.

(a) Within ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person, except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with a notice of the charge within ten days after the filing of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice. Where appropriate, the notice may include the identity of the person or organization filing the charge.

(b) The District Directors, the Area Directors, Local Directors, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, or their designees, are hereby delegated the authority to issue the notice described in paragraph (a) of this section.